

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NATHAN L. WILLIAMS
Claimant

VS.

CENTRAL TRANSPORTATION SERVICE
Respondent

AND

NATIONAL INTERSTATE INS. CO.
Insurance Carrier

Docket Nos. 1,058,494
& 1,058,495

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the May 4, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. Joseph Seiwert of Wichita, Kansas, appeared for claimant. Ryan D. Weltz of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 12, 2012, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

In Docket No. 1,058,494, claimant asserts he sustained a right shoulder injury by repetitive trauma while employed by respondent. In Docket No. 1,058,495, claimant asserts he sustained bilateral knee injuries by repetitive trauma while employed by respondent. At the preliminary hearing, claimant requested the ALJ order medical treatment and temporary total disability benefits. In both claims, respondent raised four defenses: (1) claimant failed to prove a personal injury by repetitive trauma; (2) claimant failed to prove his personal injury arose out of and in the course of his employment;

(3) claimant failed to give timely notice; and (4) claimant failed to prove his work activity was the prevailing factor giving rise to his injuries and need for medical treatment.

The ALJ determined the date of claimant's injury in both claims was October 17, 2011, the last day he worked for respondent. ALJ Barnes found claimant gave timely notice in both claims and implicitly found claimant sustained personal injuries by repetitive trauma in both claims arising out of and in the course of his employment with respondent.

The issues to be determined in both claims are:

1. What was the date of claimant's injury in each claim?
2. Did claimant give timely notice to respondent?
3. If so, did claimant sustain personal injuries by repetitive trauma? In Docket No. 1,058,494, did claimant injure his right shoulder as a result of repetitive trauma or a single traumatic accident?
4. If claimant gave timely notice, did claimant prove by a preponderance of the evidence that his personal injuries by repetitive trauma arose out of and in the course of his employment with respondent? Specifically, did claimant prove the repetitive nature of his work was the prevailing factor giving rise to his injuries and need for medical treatment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant began working for respondent in May 2010. He worked 55 hours a week, five days a week. His duties included washing and repairing semi-trailers. In a typical week, claimant would wash 28 trailers. Once he finished washing trailers, he would then work on repairing trailers. Washing each semi-trailer required claimant to climb four times up and down a ladder that is built into the trailer to get on top of it. A spinner, weighing approximately 175 pounds, would be suspended from the ceiling by a chain. The spinner would be unhooked, and claimant would have to physically maneuver it into position so that it could be lowered through a hole in the top of the trailer. The spinner was connected to a water source. Claimant would turn on the water causing the spinner to spin and throw water into the interior of the trailer, cleaning it. After the trailer was washed, claimant would pull the spinner out of the hole and hook it to the chain.

Because his knees began hurting three to four weeks earlier, claimant went to see Dr. Brennen L. Lucas, an orthopedic specialist, on September 9, 2011. Claimant testified that his left knee had begun swelling, but he had problems to a lesser extent with his right knee. Sometime before he went to see Dr. Lucas, claimant testified he showed the

swollen left knee to his supervisor, Greg Ulery, and asked to leave early. Mr. Ulery allowed claimant to go home that day at 1 p.m.

Claimant testified that he had to get permission from Mr. Ulery to get off work to see Dr. Lucas. Claimant testified he told Mr. Ulery the reason for the appointment with Dr. Lucas. According to claimant, he received a cortisone shot and a shot of steroids in his left knee from Dr. Lucas. Claimant attributed his knee problems to climbing the ladders at work.

On September 20, 2011, claimant went to the emergency room at Wesley Medical Center because of severe right shoulder pain and tooth pain unrelated to this claim. The physician at the emergency room indicated there was no damage to claimant's right shoulder. Claimant began having problems with his shoulder around the first part of August 2011 when he pulled a spinner out of a trailer. Climbing the ladders and maneuvering the spinner in place caused claimant to have right shoulder pain. After claimant began experiencing right shoulder pain, he carried the spinner differently. Claimant testified that he mentioned the right shoulder problem to Mr. Ulery long before the emergency room visit on September 20, 2011.

On the same day claimant went to the emergency room claimant mentioned the left knee was hurting to Mr. Ulery. Mr. Ulery asked claimant if he was going to file for workers compensation. Claimant replied that he was going to file it under health insurance. However, claimant's health insurance refused to provide coverage as the knee problems were work related. Claimant indicated his shoulder problems were not discussed in that conversation. Claimant also acknowledged he did not explain to Mr. Ulery the shoulder and knee problems were work related. After claimant went to the emergency room he provided paperwork to Mr. Ulery indicating the reason for the visit to the emergency room. Claimant also testified that a week after he hurt his right shoulder, he told Mr. Ulery about hurting the right shoulder.

On September 30, 2011, claimant saw Dr. Lucas for the right shoulder. He asked Dr. Lucas to inject the right shoulder with cortisone, since it worked so well on the left knee. Instead, Dr. Lucas ordered an MRI, which revealed a torn rotator cuff. Claimant again met with Dr. Lucas on October 14, 2011, to go over the MRI results. Dr. Lucas' note memorializing that appointment states: "He [claimant] states that this may be a work related injury and he is going to explore the possibility of Workers' Compensation claim on this injury."¹ Dr. Lucas wrote a note for claimant to give Mr. Ulery indicating claimant should undergo surgery to repair the torn rotator cuff. Dr. Lucas also indicated that after surgery, claimant would be in a sling and could not perform regular job duties. However, he gave claimant no immediate restrictions. Claimant testified that after he gave respondent the note, he was laid off despite the fact he had been given no restrictions or

¹ P.H. Trans., Cl. Ex. 2.

limitations. His last day worked was October 17, 2011. Claimant filed for and received unemployment benefits. Claimant testified he now has to repay the unemployment benefits because of the injuries.

Mr. Ulery confirmed he spoke to claimant on September 20, 2011. In fact, he contacted claimant to find out why claimant missed work the day before. Mr. Ulery testified claimant indicated he wasn't feeling well due to a swollen jaw. Mr. Ulery denied that he ever let claimant go home early because of a swollen left knee, but admitted claimant mentioned a left knee problem before September 20, 2011.

On September 26, 2011, Mr. Ulery was astounded to learn from the Human Resources Director that respondent received a workers compensation claim from claimant for injuries to his knees and right shoulder. September 26, 2011, was the last day claimant worked in the shop under Mr. Ulery's supervision. Mr. Ulery does not know if claimant continued to work for respondent after that date.

The records of Dr. Lucas and Wesley Medical Center were made exhibits at the preliminary hearing. The testimony claimant gave about his appointments with Dr. Lucas and his visit to Wesley are consistent with the medical records. The September 9, 2011, note of Dr. Lucas indicates claimant's left knee would become tender after a day's work of performing manual labor. Dr. Lucas assessed claimant with a possible left knee lateral meniscus tear, a grade two left knee effusion and osteoarthritis of the left knee. No restrictions were issued by Dr. Lucas.

Dr. Lucas' records reflect that he saw claimant on September 30 and October 14, 2011, for the right shoulder and left knee. Dr. Lucas noted on September 30, 2011, that claimant "did have an injury, but he does not remember exactly when this injury occurred. He felt like it was tearing within his shoulder. He has had weakness over the last several months."² After ordering an MRI, Dr. Lucas saw claimant on October 14, 2011. He provided claimant with a note stating that claimant needed rotator cuff surgery and following surgery claimant would be in a sling for six weeks and would be unable to perform his normal job duties. Dr. Lucas' records from the September 30 and October 14 appointments do not state Dr. Lucas believed the right shoulder injury was work related. Claimant has not undergone surgery to repair the tear of his right shoulder rotator cuff.

The records of Wesley from claimant's September 20, 2011, emergency room visit indicate claimant believed he injured the right shoulder when climbing up and down trailers. The records go on to state that he "[h]as continued to reinjure."³

² *Id.*

³ *Id.*, Cl. Ex. 1.

The ALJ found claimant's date of injury in both claims was the last day he worked, and that he gave timely notice of the injuries. ALJ Barnes implicitly determined that in both claims, claimant proved by a preponderance of the evidence that he sustained personal injuries by repetitive trauma arising out of and in the course of his employment with respondent. Further, the ALJ found in both claims that the repetitive nature of claimant's work was the prevailing factor causing his injuries and need for medical treatment. She then authorized Dr. Lucas as claimant's treating physician and ordered respondent to pay temporary total disability benefits if Dr. Lucas took claimant off work. ALJ Barnes also ordered respondent to pay claimant's outstanding medical bills from Wesley Medical Center and Dr. Lucas as authorized expenses.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."⁵

K.S.A. 2011 Supp. 44-508(e) provides the date of injury by repetitive trauma is the earliest of four events. Pursuant to K.S.A. 2011 Supp. 44-508(e) the earliest event in both claims triggering claimant's date of injury is claimant's last day worked. The other three triggering events never occurred in this claim. No physician took claimant off work due to his repetitive injuries. Claimant was not placed on modified or restricted duty by a physician. Dr. Lucas recommended rotator cuff surgery and noted restrictions for after the surgery, which claimant has not undergone. No physician advised claimant that his right shoulder or bilateral knee problems were work related. Claimant thought his right shoulder and bilateral knee problems were work related, but Dr. Lucas never stated claimant's injuries were work related. Therefore, this Board Member finds October 17, 2011, is the date of injury in both claims. Claimant gave notice of his injuries to respondent on September 26, 2011. Consequently, this Board Member finds claimant gave respondent timely notice in both claims.

Respondent asserts claimant did not sustain personal injuries by repetitive trauma in either claim. In Docket No. 1,058,494, respondent asserts claimant's employment did not expose him to a greater risk of shoulder injury than he would have been exposed absent his employment. Claimant's job duties required him to climb ladders in the trailers frequently and to maneuver a spinner weighing approximately 175 pounds. He did not

⁴ K.S.A. 2011 Supp. 44-501b(c).

⁵ K.S.A. 2011 Supp. 44-508(h)

perform such activities away from work. Claimant's job tasks at work exposed him to an increased risk of injury.

Respondent asserts that claimant's right shoulder injury was caused by a single traumatic accident in August 2011 and was not caused by repetitive trauma at work. Claimant did testify that he hurt his right shoulder pulling a spinner out of a trailer in August 2011. However, he continued to perform his normal job duties until at least September 26, 2011. Claimant testified his shoulder symptoms became worse. The records from Wesley indicate claimant injured his right shoulder climbing up and down ladders and continued to reinjure it thereafter. This Board Member is convinced that claimant's right shoulder injury was incurred as the result of claimant's repetitive work activities.

Respondent's final argument is that claimant failed to prove his personal injuries by repetitive trauma arose out of and in the course of his employment with respondent. Specifically, respondent contends claimant failed to prove the repetitive nature of his work was the prevailing factor causing his injuries and need for medical treatment. K.S.A. 2011 Supp. 44-508(e) states in part, "The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury." K.S.A. 2011 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Here, the diagnostic and clinical tests of Dr. Lucas demonstrated that claimant suffered bilateral knee and right shoulder injuries. The ALJ considered all relevant evidence submitted by the parties. Claimant testified it was his repetitive work activities that caused his injuries and resulted in a need for medical treatment. Respondent offered insignificant evidence that any activity or incident other than claimant's work activities was the prevailing factor causing claimant's injuries and need for medical treatment. Accordingly, this Board Member finds claimant proved by a preponderance of the evidence that the repetitive nature of his work was the prevailing factor causing the bilateral knee and right shoulder injuries. This Board Member further finds that claimant proved by a preponderance of the evidence in both claims that his personal injuries by repetitive trauma arose out of and in the course of his employment with respondent.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted

⁶ K.S.A. 2011 Supp. 44-534a.

by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁷

CONCLUSION

1. Claimant's date of injury in both claims was October 17, 2011, his last date worked.
2. Claimant provided timely notice on September 26, 2011, to respondent in both claims.
3. In both claims, claimant sustained personal injuries by repetitive trauma.
4. In both claims, claimant proved by a preponderance of the evidence that his personal injuries by repetitive trauma arose out of and in the course of his employment with respondent. Specifically, claimant proved in both claims that the repetitive nature of his work was the prevailing factor giving rise to his injuries and need for medical treatment.

WHEREFORE, the undersigned Board Member affirms the May 4, 2012, preliminary hearing Order entered by ALJ Barnes.

IT IS SO ORDERED.

Dated this ____ day of July, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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⁷ K.S.A. 2011 Supp. 44-555c(k).